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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BRITTANY B. et. al, Persons  
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ELIZABETH P.,

Defendant and Appellant.

D043631

(Super. Ct. No. J513575-B/C)

APPEAL from a judgment of the Superior Court of San Diego County, Susan D.  
Huguenor, Judge. Affirmed.

Elizabeth P., the mother of Brittany B. and Caitlin O., appeals the termination of her parental rights to Caitlin under Welfare and Institutions Code section 366.26.<sup>1</sup> Elizabeth contends the juvenile court erred by failing to apply the beneficial relationship (§ 366.26, subd. (c)(1)(A)) and/or the sibling relationship (§ 366.26, subd. (c)(1)(E)) exceptions to adoption in Caitlin's case. Elizabeth also contends the court erred by denying her section 388 petition seeking the return of Caitlin and Brittany, whose permanent plan is long-term foster care. Additionally, Elizabeth urges reversal on the ground that Caitlin and Brittany, who were represented by the same attorney below, received ineffective assistance of counsel because of a conflict of interest.

#### PROCEDURAL AND FACTUAL BACKGROUND

In addition to Brittany and Caitlin, Elizabeth is the mother of Meahgan B. In the summer of 2000, Elizabeth and her daughters were living with Steve O., Caitlin's father. During Elizabeth and Steve's five-year relationship there had been numerous domestic violence incidents that were initiated or exacerbated by the couple's drinking. In August 2000, Meahgan, then 13 years old, and Brittany, then 11 years old, reported Steve physically abused them, and Steve and Elizabeth had physical altercations in the home. On September 15, the San Diego County Health and Human Resources Agency (Agency) took the children, including 14-month-old Caitlin, into protective custody. Five days

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

later, Agency filed dependency petitions on behalf of the children under section 300, subdivisions (b) and (j).<sup>2</sup>

In October, the juvenile court sustained the petitions as amended and placed the children with Elizabeth. The court ordered Steve to not have contact with Brittany and Meaghan. The court also ordered supervised visits for Steve with Caitlin two times a week, to be held away from Elizabeth's home.

In January 2001, Agency removed the children from Elizabeth's home and filed supplemental petitions (§ 387), alleging the previous order placing the children with Elizabeth had been ineffective in protecting the children because Elizabeth was abusing alcohol, leaving the children without supervision and allowing Steve to stay in the home in violation of a court order. Steve stayed with the family after Elizabeth was involved in a motorcycle accident.

In March, the parties stipulated to a negotiated settlement of the section 387 petition: Elizabeth was ordered to enroll in the Substance Abuse Recovery Management System program (SARMS); Brittany and Caitlin were returned to Elizabeth's home on the condition that Steve not reside in the home; and the section 387 petition was dismissed. At the six-month review hearing on May 1, the court ordered six more months of services.

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<sup>2</sup> Caitlin's petition also included an allegation under section 300, subdivision (a), that was later dismissed. Meaghan is not a subject of this appeal.

On June 26, Agency filed a second section 387 supplemental petition, alleging that Elizabeth and Steve had a physical altercation in the presence of Caitlin on May 5. The social worker reported that Elizabeth and Steve initially denied they had fought until Agency discovered police had been called during the incident and a police report was available. Brittany and Caitlin were removed from Elizabeth's home on June 21. In August, Brittany was ordered placed in a licensed group home and Caitlin in a licensed foster home. Elizabeth was ordered to attend a 52-week domestic violence class. Elizabeth did not enroll until the end of October and was soon dismissed for excessive absences. Elizabeth reenrolled in December and attended regularly.

Elizabeth had minimal contact with Steve from May through November 2002, when she completed her case plan requirements. Agency returned Brittany to Elizabeth's home for a 60-day trial visit in November and recommended Caitlin be returned home at the upcoming 18-month review. However, on December 8, 2002, there was alcohol-related domestic violence between Elizabeth and Steve. Elizabeth threw a ceramic object, which hit Steve on the head. Steve bled profusely, and Brittany was upset by the large amount of blood. Agency removed Brittany on December 10.

On January 16, 2003, Brittany and four other girls left Polinsky Children's Center without permission and spent the night at Elizabeth's residence. Elizabeth did not notify authorities until she returned the girls the following evening.

On January 24, the juvenile court terminated services in Brittany's case and designated long-term foster care as her permanent plan. On February 26, the court terminated services in Caitlin's case and set a section 366.26 hearing.

On June 17, Elizabeth, who had continued participating in services at her own expense, filed a section 388 petition requesting return of Brittany and Caitlin to her. Elizabeth alleged both children wanted to be placed with her, she had ended her relationship with Steve, she had made significant progress in therapy, she had developed the ability to protect the children from harm, and she could meet the children's physical, emotional and financial needs.

On June 18, Elizabeth had an unmonitored visit with Brittany and did not return Brittany to her placement. Brittany telephoned the foster parents the next day and asked them to pick her up. After this incident, Agency required Elizabeth's visits to be supervised. Although Elizabeth maintained telephone contact with Brittany, she did not visit her daughter for nearly five months.

The combined section 388 and section 366.26 hearings were held on August 13, November 13 and November 14. It was stipulated that Brittany, if called as a witness, would testify she wanted to return home to her mother. The social worker in Brittany's case opined it would not be in Brittany's best interests to be returned to Elizabeth based on the recurring domestic violence in the home that Brittany had observed and Elizabeth's poor judgment in not promptly returning Brittany and the other girls to Polinsky Children's Center and other incidents.

Elizabeth's therapist, Dawn Boyes, testified Elizabeth had made dramatic improvement after the domestic violence incident the previous December. As a result, Boyes said Elizabeth had a greater understanding of the impact of domestic violence on children. Elizabeth was nearing the end of her individual therapy. Even though

Elizabeth occasionally exercised questionable judgment regarding Brittany, Boyes said Elizabeth was now better able to deal with stress, avoid violent relationships and maintain her sobriety.

Raymond Murphy, a forensic psychologist, observed Elizabeth and Caitlin for two hours and concluded there was a primary bond between them. Murphy opined: "[A]ny disruption in contact between mother and daughter will clearly represent a detriment to the minor."

Elizabeth's visits with Caitlin had been affectionate and appropriate, according to the stipulated testimony of the visitation supervisor. Caitlin's social worker also reported Elizabeth's visits with Caitlin went well and they had a loving relationship. However, the social worker opined it was not in Caitlin's best interests to be returned to Elizabeth, characterizing the situation as high risk. The social worker recommended adoption, noting Caitlin had had eight placements since she was taken into protective custody and needed stability at this stage in her life. Caitlin's foster parent, who wanted to adopt Caitlin, arranged visits between Caitlin and her sisters, Meahgan and Brittany. The social worker testified the foster parent strongly believed in sibling contact and allowed her other adoptive child to have contact with the biological family.

The court denied the section 388 petition, finding Elizabeth had failed to show either changed circumstances or granting the petition would be in the children's best interests. The court found it was likely Caitlin would be adopted and that none of the statutory exceptions to adoption (§ 366.26, subd. (c)(1)) existed. The court terminated parental rights and ordered adoption as Caitlin's permanent plan.

## DISCUSSION

### I. *Section 388 Petition*

Elizabeth contends the court abused its discretion by denying her section 388 petition.

Section 388 provides that a parent may petition the court for a hearing to change, modify or set aside any previously made order of the court on the grounds of changed circumstances or new evidence. The statute states: "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." (§ 388, subd. (c).) We review the juvenile court's order denying the section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

To prevail on her petition, Elizabeth had to show "not only changed circumstances but that a change in the child's placement would be in the best interests of the child." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48.) Where a parent's circumstances are "changing, rather than changed," it is not an abuse of discretion to deny a section 388 petition if the court concludes that granting the petition would not be in the child best interests "given [the child's] strong and immediate need for stability." (*Id.* at p. 49.)

Elizabeth needed to show the circumstances that caused the removal of her children were no longer present. She did not do so. At most, Elizabeth showed changing circumstances regarding her ability to safely parent her children. Although her therapist testified Elizabeth had made great progress since the last alcohol-related domestic violence incident, Elizabeth had shown sufficient progress in the past to have the children

returned only to relapse, resulting in their removal. The court properly can consider the parent's pattern of conduct as well as present circumstances. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 546.) Moreover, Elizabeth had more recently shown poor judgment in two incidents regarding Brittany.

Elizabeth also did not meet her burden to show that returning the children to her was in their best interests. Brittany had been removed from Elizabeth's home four times because of recurring domestic violence and/or alcohol abuse. Brittany reported nightmares about the domestic violence she had seen. Brittany expressed disappointment about Elizabeth's poor judgment and remarked she sometimes felt like a parent to Elizabeth. After supervised visitation was imposed in June 2003, Elizabeth had no face-to-face contact with Brittany for five months.

As to Caitlin, we note that at this stage of the proceedings — the section 366.26 hearing — a minor's interest in stability is a juvenile court's foremost concern. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) Caitlin had already had eight placements since she was initially removed. Like Brittany, but to a lesser extent, Caitlin had repeatedly been returned to Elizabeth only to be removed when Elizabeth relapsed. For more than two years, Elizabeth had been unable to meet Caitlin's need for permanence and stability. Caitlin's caretaker wished to adopt her and had an approved home study. Returning Caitlin to Elizabeth in the hope she might be able to provide a safe, permanent home for the child in the future would not have promoted Caitlin's need for stability and permanence. "[C]hildhood does not wait for the parent to become adequate." [Citation.] (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) Moreover, Caitlin was



displaying aggressive behavior immediately before and after her visits with Elizabeth. The social worker opined Caitlin was confused and not benefiting from the visits.

The court did not abuse its discretion by denying Elizabeth's section 388 petition.

## II. *Statutory Exceptions to Adoption*

Elizabeth contends the juvenile court erred by choosing adoption as Caitlin's permanent plan because adoption would interfere with the beneficial parent-child relationship between them and with Caitlin's relationship with her sisters.

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the court must terminate parental rights if the child is likely to be adopted within a reasonable time unless a statutory exception applies. (§ 366.26, subd. (c)(1).) The five statutorily recognized exceptions to adoption include the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(A)) and the sibling relationship exception (§ 366.26, subd. (c)(1)(E)). The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345; § 366.26, subd. (c)(1).)

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts in favor of the prevailing party, and draw all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

### *Beneficial Parent/Child Relationship*

Section 366.26, subdivision (c)(1)(A) provides that after the court finds the child is likely to be adopted the court shall not terminate parental rights if it finds termination would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship." (Italics added.) The exception applies only if both prongs are met.

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial relationship exception to adoption, a parent must show the "relationship promotes the well-being of the child to such a degree as to *outweigh* the well-being the child would gain in a permanent home with new, adoptive parents." (Italics added.) The court must balance "the strength and quality of the . . . parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*Ibid.*) In balancing these interests, relevant factors include "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*Id.* at p. 576.) Further, the parent must show the benefit arises from a parental rather than caretaker or friendly visitor relationship. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420 [exception does not apply when a parent "has frequent contact with [dependent child] but does not stand in a parental role to the child"]; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 [frequently visiting mother occupied pleasant place in minor's life, but did not have parental role].)

There is substantial evidence that Elizabeth regularly visited Caitlin; the first prong of section 366.26, subdivision (c)(1)(A) was met. However, there was substantial evidence that Elizabeth and Caitlin did not have a beneficial parent-child relationship.

Caitlin was taken into protective custody when she was 14 months old because of her parents' domestic violence and alcohol abuse. Caitlin was returned to her mother at the disposition hearing, but three months later removed again because Elizabeth was drinking and violated a court order by allowing Steve into the home. Two months later, Caitlin was returned to Elizabeth. This placement lasted three months; Caitlin was removed because of another domestic violence incident and placed in foster care. Caitlin has remained in foster care since August 2002. It was her foster parents, not Elizabeth, who have met Caitlin's daily needs for the bulk of her life. By all reports, Caitlin and Elizabeth shared a strong attachment, but they did not have a parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(A). Notwithstanding the bond between Elizabeth and Caitlin, the benefit to Caitlin from continuing their relationship would not outweigh the benefit Caitlin would gain from the permanence of an adoptive home. The juvenile court said that it gave little weight to Murphy's opinion that severing Caitlin's relationship with Elizabeth would be detrimental to Caitlin; the court noted Caitlin had shown herself to be a very resilient child. As trier of fact, it was within the juvenile court's purview to assess the credibility of witnesses, including expert witnesses. As an appellate court, we do not second-guess such evidentiary assessments.

There was substantial evidence that the benefit to Caitlin from continuing her relationship with Elizabeth did not outweigh the benefit she would gain from the permanence of an adoptive home.

### *Sibling Relationship*

Subdivision (c)(1)(E) was added to section 366.26 effective January 2002 as a fifth enumerated exception to adoption relating to sibling relations. "Thus, adoption shall now be ordered 'unless the court finds a compelling reason for determining that termination [of parental rights] would be detrimental to the child' because '[t]here would be substantial interference with a child's sibling relationship. . . .' (§ 366.26, subd. (c)(1)(E))." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 811.) Factors to be considered include the nature and extent of the relationship, whether the child was raised with a sibling in the same home, and whether the child has strong bonds with a sibling. (§ 366.26, subd. (c)(1)(E).) The court must also consider whether ongoing contact is in the child's best interests, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. (*Ibid.*) The sibling relationship focuses exclusively on the benefits and burdens to the child being considered for adoption, not the other siblings. (*In re Celine R.* (2003) 31 Cal.4th 45, 49-50, 54-55.)

The threshold showing for the exception is that, with termination of parental rights, "[t]here would be substantial interference with a child's sibling relationship . . . ." (§ 366.26, subd. (c)(1)(E); see also *In re L.Y.L.*, (2002) 101 Cal.App.4th 942, 951-952.) Here, the evidence shows that the prospective adoptive parent was committed to maintaining contact between Caitlin and her sisters. Thus, there was substantial evidence

that Caitlin's adoption would not substantially impair the maintenance or further development of Caitlin's relationship with her siblings. Put another way, Elizabeth did not meet her initial burden to show Caitlin's sibling relationship with the older girls was threatened by an adoption order. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 952.)<sup>3</sup>

### III. *Single Attorney Representing Caitlin and Brittany*

Elizabeth contends minors' counsel rendered ineffective assistance of counsel because he had a conflict of interest in representing both children. According to Elizabeth, Caitlin's interest in being adopted conflicted with Brittany's interests in maintaining the sibling relationship.

Rejecting Agency's argument that Elizabeth's failure to raise this issue below constitutes a waiver (see *In re Crystal J.* (1993) 12 Cal.App.4th 407, 414) and assuming Elizabeth has shown the alleged conflict of interest affected her (*In re Frank L.* (2000) 81 Cal.App.4th 700, 703), we will consider the conflict claim on its merits.

In dependency cases, after the initial appointment of counsel, a juvenile court must "relieve counsel from multiple representation if, but only if, an *actual* conflict arises." (*In re Celine R.*, *supra*, 31 Cal.4th at p. 58, italics added.) Mere potential conflicts do not support the appointment of special counsel. (*Id.* at pp. 56-58.)

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<sup>3</sup> Once the threshold showing is made, the parent must show the sibling relationship was so strong that its severance would be detrimental to the adoptive child. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 952; see also *In re Celine R.*, *supra*, 31 Cal.4th at p. 55 ["the ultimate question is whether adoption will be detrimental to the adoptive child"].) If these two requirements are met, the court must undertake a balancing analysis and decide whether the benefit to the child of continuing the sibling relationship outweighs the benefit of adoption. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 952-953.)

Here, the record shows no actual conflict of interest between Brittany and Caitlin. As discussed above, the prospective adoptive parent said she would allow sibling visitation and had a track record to back up the commitment. Elizabeth claims there was a conflict because the prospective adoptive parent would not allow sibling visitation if Brittany was placed with Elizabeth. Our reading of the record does not support this claim.<sup>4</sup> In any event, Brittany was not placed with Elizabeth and her permanent plan remained long-term foster care. Thus, even if we were to accept Elizabeth's claim, at the relevant time there was no actual conflict between Brittany's interest in continuing the sibling tie and adoption as a permanent plan for Caitlin. Adoption, which clearly was in Caitlin best interests, would not sever the sibling connection. Any suggestion that a future placement of Brittany with Elizabeth would jeopardize the maintenance of the sibling relationship adds speculation to a questionable reading of the record and cannot constitute an actual conflict that required appointment of separate counsel.

Furthermore, the record is somewhat ambivalent about the strength of the sibling relationship in this case. The social worker observed Caitlin asking Elizabeth about her sisters during a visit. Also, Caitlin told the social worker that she likes to visit with them.

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<sup>4</sup> Elizabeth refers to a page of the reporter's transcript in which her counsel is cross-examining Caitlin's social worker. The relevant portion reads: "Q. If, hypothetically, Brittany were returned to [Elizabeth's] care, would — have you discussed with Caitlin's foster parents whether they would be willing to continue the sibling contact in that event? [¶] A. I didn't pose the question in that way, but she strongly feels that the siblings should have contact, and she also believes that later in life, as Caitlin matures, she could have contact with her biological parents. [¶] So I don't feel that . . . she would not allow contact with Brittany if she was placed back with her biological mother."

However, the foster parents reported Caitlin did not talk about her siblings. Further, Brittany's principal focus in these proceedings was being placed with Elizabeth, not maintaining her sibling relationships. (Cf. *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423, 1428.)<sup>5</sup> We conclude the record also would not support a finding of significant detriment should the sibling relationships be severed. At the time of the hearing Caitlin was four years old and Brittany was 14 years old. In the three years and two months since the initial section 300 petitions were filed, Caitlin had lived with Brittany for five months.<sup>6</sup>

Elizabeth's criticism of minors' counsel for not obtaining authorization for a bonding study between Brittany and Caitlin borders on being disingenuous. Elizabeth's trial counsel could have sought such authorization, but Elizabeth makes no claim of ineffective assistance of her trial counsel for failing to do so.

In any event, even assuming an actual conflict existed, the failure to have separate counsel for Brittany and Caitlin is subject to harmless error analysis — that is, reversal is mandated only if it is reasonably probable that independent counsel would have made a

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<sup>5</sup> We note minors' counsel informed the court of Brittany's desire to return to Elizabeth's care at the same time that he argued against the section 388 motion because, in his professional judgment, placement with Elizabeth was not in Brittany's best interests. Counsel met his professional obligations. (*In re Candida S.* (1992) 7 Cal.App.4th 1240, 1253.) "[T]he obligation of counsel for a dependent minor is to pursue whatever is in the minor's best interest. This may or may not be what the minor wishes." (*Ibid.*)

<sup>6</sup> Caitlin lived a longer period of time with Meaghan because Meaghan and Caitlin had the same foster home placement for approximately nine months.

difference in the outcome. (*In re Celine R.*, *supra*, 31 Cal.4th at pp. 59-60.) Under the circumstances presented here, we conclude that any error in not having separate counsel for Brittany and Caitlin was harmless.

It is undisputed that Caitlin was adoptable. We previously concluded that the exception to termination of parental rights for interference with a sibling relationship did not apply to Caitlin. Thus, even if separate counsel had been appointed to represent Brittany and such counsel had secured a bonding study between the two sisters and argued for a permanent plan other than adoption for Caitlin, a different outcome was not reasonably probable.

To establish ineffective counsel in a dependency case, a party must show: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) "A court need not evaluate whether counsel's performance was deficient before examining prejudice suffered by defendant. [Citation.] Thus, a court may reject a claim if the party fails to demonstrate that but for trial counsel's failings, the result would have been more favorable to the defendant." (*Id.* at p. 1180.)

Here, because we are unable to say that the court would have made a different ruling had independent counsel been appointed for Brittany, we are likewise unable to say that minor's counsel's actions resulted in prejudice. The ineffective assistance of counsel claim necessarily fails.



DISPOSITION

Affirmed.

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HALLER, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.